Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

DONALD C. HAYHURST,
JANE DOE HAYHURST,

Petitioners,

v.

AMERICAN ASSOCIATION OF
NATUROPATHIC PHYSICIANS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMERICAN ASSOCIATION OF NATUROPATHIC PHYSICIANS, Plaintiffs, v. DONALD C. HAYHURST; JANE DOE HAYHURST, and AMERICAN ACADEMY OF NATUROPATHIC PHYSICIANS, Defendants.	No. C98-1055C REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION TO VACATE AND SET ASIDE DEFAULT JUDGMENT RULE 55 (c) AND MOTION TO DISMISS

INTRODUCTION

On March 9, 1999, The Honorable John C. Coughenour, Chief Judge, referred to this Court pursuant to 28 U.S.C. § 636(b) (1), Local Rule MJR 4 (a) (3) and Fed. R. Civ. P. 72(b), the above dispositive motions for a report and recommendation. (Doc. #27). By this report and recommendation, the Court recommends that the motions be DENIED.

DISCUSSION

1. The Motion to Vacate or Set Aside the Default Judgment

On January 7, 1999 the Court (Chief Judge Coughenour) entered default judgment against the Defendants. On January 26, 1999, the Defendants filed a motion to set aside the default judgment, averring that Defendant Hayhurst had not been properly served "officially or unofficially" with the complaint or with the motion for default, and had no knowledge of the "matter pending before this Honorable Court" prior to January 19, 1999. (Doc. #19). Plaintiffs, in moving for default judgment, had represented to the Court that Mr. Hayhurst had been personally served at his home in Las Vegas (Doc. #15), an argument which they repeat in opposing the motion. (Doc. #21).

The parties' contentions as to whether Defendant Hayhurst was properly served are thus in direct conflict as set forth in their filings. In their Objection to Plaintiff's Opposition to Motion to Vacate and Set Aside Default Judgment (Doc. 23), Defendants Donald C. and Jane Doe Hayhurst acknowledge that they live at "8170 Creek Water Lane, Las Vegas, Nevada," but contend that the process server's description of the male individual who he served is inconsistent with the appearance of Defendant Hayhurst. (*Id.* at 3).

On March 26, 1999, the Court held a telephone status conference attended by the Defendant Donald Hayhurst, pro se, and Lawrence Graham, Esq., counsel for Plaintiff. At that conference, the Court informed the parties that it had reviewed the filings on the issue of service and

determined that an evidentiary hearing was necessary and would be held before the Court on May 12, 1999, at 1:30 p.m. (Doc. #28). The date of the hearing was set in order to provide Mr. Hayhurst an opportunity to retain a lawyer, which he indicated during the conference that he wished to do. Mr. Hayhurst agreed during the conference that the date selected would provide him adequate opportunity to consult with and/or retain an attorney beforehand.

During the conference, Mr. Hayhurst expressed great reluctance to attend the evidentiary hearing, expressing concern that it would provide the Plaintiffs with an opportunity to serve pleadings upon him. In making these arguments, Mr. Hayhurst, on several occasions during the conference, referred to the Court as a "State of Washington" court. The Court explained to the Defendant its status as a federal, and not a state court. The Court explicitly explained to the parties that it was ordering the personal appearance of the Defendant Donald Hayhurst and the process server, Edward Gutierrez, so that it could resolve the question of which witness was telling the truth, by observing their respective demeanors. The Court also advised both parties that failure of either Mr. Hayhurst or the process server to appear before the Court as ordered would be considered in resolving the service issue. (*Id.*). On that same date, the Court issued a Minute Order (Doc. #29) ordering Plaintiff to produce at the hearing the process server, ordering Defendant Donald Hayhurst to appear in person, and reminding the parties that failure to comply with the Order "will be considered by the Court in deciding this motion." (*Id.*).

On April 7, 1999, Defendant Donald Hayhurst filed an Affidavit of Defendant Hayhurst in Support of Prior Motion to Vacate/Set Aside Default Judgment and Motion to Dismiss and Objection to Scheduled Evidentiary Hearing. (Doc. #30). In this filing, Defendant Hayhurst again expressed the view that "the State of Washington" was violating his rights by ordering him to appear for the evidentiary hearing. Mr. Hayhurst clearly indicated in the filing that he was refusing to attend the hearing, and asked the Court to reconsider its Order setting the hearing. (*Id.*). Mr. Hayhurst attached to his filing photographs which he swore under oath are photographs of himself and his wife. (Doc. #30, exhibit).

On the day of the hearing, the Court received a letter from Defendant Hayhurst confirming that he would not attend the hearing and offering a statement from a physician that he had been advised to avoid travel. (Doc. #33).

Plaintiffs duly appeared as ordered at the evidentiary hearing and called as a witness the process server, Edward E. Gutierrez. Mr. Gutierrez testified that he is a former agent of the federal Drug Enforcement Agency who is now in private life, working as a private investigator and process server. Mr. Gutierrez identified the photographs attached to Defendant Hayhurst's filing (Doc. 30), as being the person he served legal papers on in this case on three different occasions, at Defendant Hayhurst's address at 8170 Creekwater Lane, Las Vegas, Nevada.

The first service occurred on April 24, 1998, and the papers served were a "Service package with a copy of trademark registration" (Transcript of Evidentiary Hearing [hereinafter, "Tr."] at 7). He testified that on this

occasion Defendant Hayhurst came to the door and opened it, but then closed it when he realized the witness' purpose. The witness testified that he informed the Defendant through the door that he was leaving the papers on the step in front of the door and that the Defendant was served.

The witness testified that he served the summons and complaint on Defendant Hayhurst on August 13, 1998. (Tr. at 11). He testified that on that date he arrived at the Defendant's residence, and found Defendant's son in the open garage of the dwelling. While he was talking to the son, the Defendant came out of the residential portion of the dwelling into the garage and spotted the process server, who told him that he had a summons to serve. The witness testified that Defendant stated that he "did not want the papers," and quickly left the garage. The witness testified that he informed the Defendant that he was leaving the papers in the garage, and also told the son that he was leaving the papers in the garage, which he in fact did. (Tr. at 12). He testified that Defendant did not exhibit any signs of ill health.

Mr. Gutierrez testified that on January 14, 1999, he served the preliminary injunction and order on default judgment on Defendant Hayhurst. On this occasion, he waited outside the Defendant's home until Defendant Hayhurst exited his house. When Defendant spotted the process server, he hurriedly headed back into the house, but not before he was told that the process server had papers to serve upon him. The witness testified that since his last visit to Defendant's home, Defendant had installed a bar in front of his door which prohibited the process server from reaching the front door. Defendant

Hayhurst told the process server to "leave it out here on the steps . . . I don't care." (Tr. at 14). The witness testified that he placed the documents on the front step as directed by the Defendant. (Tr. at 15).

As indicated, Mr. Gutierrez identified the photographs submitted by Defendant as being the person he served on the three occasions set out above. (R. 16).

The Court found the witness Gutierrez to be credible in his testimony. The Court finds Defendant Hayhurst's representations to the Court that he was not the person served by the process server, not to be credible. Nor does the Court find credible Defendant Hayhurst's preferred "medical excuse" for not attending the evidentiary hearing, as ordered. Mr. Hayhurst made it clear to the Court prior to submitting the statement from his doctor, that he did not intend to comply with the Court's orders. He disobeyed the order to appear for the hearing after being warned by the Court that his failure to comply might be considered by the Court in resolving the issue of credibility on the service dispute.

In order to prevail in their motion to set aside the default judgment, Defendants must satisfy the requirements of Federal Rule of Civil Procedure 60(b). In *In re Hammer*, 940 F.2d 524 (9th Cir. 1991), the Court of Appeals held that such motions may be denied if "(1) the plaintiff would be prejudiced if the judgment is set aside, (2) defendant has no meritorious defense, *or* (3) the defendant's culpable conduct lead to the default." 940 F.2d at 524-25 (emphasis supplied). The Court's decision explicitly stated that "[t]his tripartite test is disjunctive." 940

F.2d at 526. The Court went on to define "culpable conduct" as being conduct where "he has received actual or *constructive* notice of the filing of the action and failed to answer the complaint." (*Id.*, emphasis in the original.)

In my opinion, Defendants fail on all three legs of the test here. First, it is clear that Plaintiffs would be prejudiced by the granting of the motion, in that they have duly sought resolution of the dispute reflected in this case and have played by the rules. Second, Defendants have made no showing that they have a meritorious defense (or, in fact, any defense at all). Third, it is clear that the Defendants had "actual or *constructive* notice of the filing of the action and failed to answer the complaint" (940 F.2d at 526). There is little doubt, given the Court's findings as to the communications between the process server and Defendant Hayhurst, that Defendants had "actual" notice of the action. Moreover, even if the issue of actual notice was resolved against the Plaintiffs (despite the evidence to the contrary), Defendants had "constructive" notice, and their conduct was thus "culpable" within the meaning of the third leg of the tripartite test.

Accordingly, I recommend that Defendants' motion to vacate/set aside default judgment, be DENIED.

The Motion to Dismiss

The Defendants also seek to have the Court dismiss this action. Initially, they sought dismissal because they were never "served by any form of process server in this matter . . . " (doc. #20). Thereafter, following the telephone conference, Defendant Hayhurst filed an affidavit

in which he contends that Plaintiff's corporate status had lapsed and Plaintiff could not maintain this action. Defendant Hayhurst maintains in his latest affidavit that "plaintiffs . . . do not have rights to the title 'American Association of Naturopathic Physicians (AANP) in the State of Oregon or Washington. . . . " (Doc. #30, par. 9(B)), and that they are "not a valid corporation at this time . . . [or] at the time of filing Complaint, or receiving default judgment." (*Id.*, par. 9(C)).

Plaintiffs have submitted a preliminary injunction order issued by the United States District Court for the District of Oregon, on May 11, 1999, in the case of *AANP, an Oregon nonprofit corporation v. American Association of Naturopathic Physicians, an Oregon Corporation*, CV 99-440-HA. In that order, the United States District Court explicitly found that plaintiffs have "at all times since 1989 . . . been a nonprofit corporation organized and existing under the laws of the state of Oregon." The District Court in Oregon has thus rejected the argument now made by Plaintiff that Plaintiff is not a valid Oregon corporation, and explicitly found to the contrary.

Accordingly, Defendants have presented no grounds for granting their motion to dismiss, and I recommend that the Court DENY the motion.

A proposed order is included with this Report and Recommendation.

DATED this 25th day of May, 1999.

/s/ David E. Wilson
DAVID E. WILSON
United States Magistrate Judge